Chapter IX

PROSECUTIONS: HEALTH QUALITY ENFORCEMENT SECTION

A. General Description of Functions

After a Medical Board district office has completed an investigation yielding sufficient evidence of chargeable physician misconduct, the case is transmitted to the Attorney General's Health Quality Enforcement Section for administrative action, or to the appropriate state or local prosecutor for criminal or civil law enforcement action. This chapter describes the prosecution of these matters by HQE and other agencies, and presents the Monitor's initial concerns and recommendations for improvements to that process.

Health Quality Enforcement Section. Effective January 1, 1991, SB 2375 (Presley)[203] added Government Code section 12529 *et seq.,* creating the Health Quality Enforcement Section (HQE) in the Attorney General's Office. A detailed discussion of the genesis of HQE and this requirement for specialized prosecution is found in Chapter IV.C. above.[204]

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[203] Cal.Stats. 1990, c. 1597.

[204] As described in Chapter IV, SB 2375's language creating HQE and requiring its involvement in MBC complaint handling and investigations was a fallback position from the author's and sponsor's original proposal to transfer MBC peace officer investigators into HQE to create a "vertical prosecution" model. According to a Senate Judiciary Committee analysis of SB 2375, "[i]t appeared to have been the intent of the sponsor to have placed Board investigators under the direct control of the Attorney General, and to generally move the disciplinary process out from under the Board and division in order that it not be compromised. This was greatly opposed by the Board and the profession. What is currently proposed is somewhat of a hybrid model." Senate Judiciary Committee, *Analysis of SB 2375 (Presley) for June 7, 1990 Hearing* (1990). The statute preserves MBC's discretion as the decisionmaking "client," but also injects HQE into the complex mix that produces that decisionmaking. The Senate Judiciary Committee analysis continues: "Instead of bringing investigators to the Department of Justice, the bill would bring the Department of Justice to the investigators. Deputy attorneys general within a new Bureau of Health Quality Enforcement in the Department of Justice, headed by a Chief Counsel appointed by the Attorney General, would be located in field offices to assist in investigations for purposes of ensuring quality evidence, to assist and participate in training, and to review the process of intake and disposition of complaints. Accusations would be filed by the executive officer in consultation with the Chief Counsel. The relationship would thus be parallel rather than hierarchical, with independent attorneys on site advising and counseling in the process. Essentially, this creates an independent 'watchdog' within the system that would chill any tendency toward impropriety, yet not usurp the existing role of the Board, the Division, or the Director." *Id*.

HQE's role in current process. Pursuant to section 12529, "[t]he primary responsibility of the section is to prosecute proceedings against licensees and applicants within the jurisdiction of the Medical Board of California [and specified allied health care boards] . . . and to provide ongoing review of the investigative activities conducted in support of those prosecutions . . . ."[205] HQE is further obligated by statute to assist the MBC in intake and investigations and "to direct discipline related prosecutions" as well as to "provide consultation and related services and engage in case review" with MBC complaint handling and investigative staff.[206]

HQE's deputies attorney general (DAGs) receive completed investigations in MBC disciplinary matters; file accusations and/or petitions for interim suspensions orders or motions for temporary restraining orders; appear in criminal matters pending against physicians to seek probation orders under Penal Code section 23; engage in pre-hearing discovery and settlement negotiations in MBC disciplinary matters; try MBC cases before administrative law judges (ALJs) of the Medical Quality Hearing Panel of the Office of Administrative Hearings; argue cases to a panel of MBC's Division of Medical Quality if the panel nonadopts the ALJ's decision; and participate in judicial review of final MBC disciplinary decisions.

In addition, under the requirements of section 12529 *et seq*., HQE attorneys perform a variety of advisory and support functions for investigations under way in MBC district offices under the "Deputy in District Office" or "DIDO" program described in detail above in Chapter VII.A. As of October 1, 2003, HQE has placed a DAG in the Central Complaint Unit to assist in the intake function as mandated in Government Code section 12529.5(b), as described above in Chapter VI.A.

HQE's structure and resources. HQE is required by statute to be "staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions against the licensees of the division or board."[207] The Attorney General's Office presently maintains HQE as a unit headed by a Senior Assistant Attorney General, consisting today of 36 DAGs undertaking these specialized healthcare administrative prosecutions, and six Supervising DAGs (SDAGs) overseeing those activities. HQE staff are located in six offices in Los Angeles, San Diego, San Francisco, Oakland, Sacramento, and Fresno, each typically under the control of an SDAG.

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[205] Gov't Code § 12529(a).

[206] *Id*. at § 12529.5(b).

[207] *Id*. at § 12529(c).

As recently as late 2000, there were a total of 42 DAGs authorized or funded for these six offices.[208] Since early 2002, HQE has lost a total of six DAG positions, and has had to absorb other long-term staff reductions (such as one DAG on extended medical leave for over a year, and another recently returned from extended maternity leave). All of these losses and resulting vacancies have occurred in the Los Angeles HQE office, making it impossible for HQE to comply with the statutory mandate of Government Code section 12529 to adequately staff all of the MBC district offices in the Los Angeles area.

Attorney General/HQE management information systems. The Office of the Attorney General and HQE have maintained various forms of recordkeeping to manage their functions, but for many years these have been universally perceived — by outside critics and the Attorney General's Office itself — to be inadequate to accurately track and manage these cases and properly bill clients, where necessary. As described in Chapter V above, the long-promised statewide ProLaw system was finally implemented in HQE beginning in July 2004, and is now in the very early stages of implementation.

HQE enforcement throughput. As summarized in Exhibit IX-A below, HQE received 580 cases transmitted from MBC investigators in 2003–04, up about 15% from the prior year, but on par with the three-year average of preceding years.[209] In 2003–04, HQE attorneys filed 262 accusations, down from a 2001–02 high of 329 but about average for the past five years as a whole. HQE staff obtained 48 prefiling stipulations and 202 postfiling stipulations in the past fiscal year, and conducted 45 administrative hearings, reflecting a steady increase in stipulations and a flat trend in trials. HQE's use of the ISO/TRO tools was down in 2003–04 some 40% from its 2001–02 high (26 ISOs/TROs sought in 2003–04 vs. 40 sought in 2001–02).

[208] This total consists of 39 authorized positions and three additional positions funded by MBC in recognition of MBC workload demands. For the past three years, MBC has submitted a budget change proposal to the Department of Finance asking for four additional authorized positions to meet workload demand, including DAG staffing of CCU, but the Department of Finance has consistently disapproved the BCP requests. Source: HQE staff (Oct. 6, 2004).

[209] The reader is cautioned that the number of cases filed in any given year represents a different universe of cases from those resolved in any given year.

Ex. IX-A. Health Quality Enforcement Section: Enforcement Throughput

	Activity	FY 1999–00	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04
HQE	Cases transmitted to HQE by MBC	491	510	589	494	580
	Pre-filing public letters of reprimand	19	17	19	17	29
	Other pre-filing stipulations	15	15	14	12	19
	Cases in which HQE declined to file	31	24	25	34	19
HQE/ OAH	ISO/TRO sought (can be pre- or post-filing of accusation)	21	34	40	24	26
	Full ISOs/TROs granted	13	10	17	12	19
	Partial restriction granted	6	7	9	0	3
	Stipulations not to practice (can be pre- or post-filing of accusation)	2	3	5	5	0
	Accusations filed	262	238	329	258	262
	Petitions to revoke probation filed	28	18	21	18	26
	Post-filing public letters of reprimand	14	10	13	11	12
	Other post-filing stipulations	242	185	158	206	202
	Accusations withdrawn	71	45	32	35	44
	Evidentiary hearings held	49	44	39	44	45
	Accusations dismissed after hearing	12	9	16	10	20
	Defaults (respondent failed to appear)	30	14	15	22	21

Source: Medical Board of California

Exhibits IX-B and IX-C below and MBC's *2003–04 Annual Report* reflect HQE case cycle times as calculated by MBC, with particular emphasis on time to filing of accusation in the six HQE offices. Average accusation filing time is down considerably from its historical high of over 365 days, but is now rising steadily from the 60–70 day level reported by HQE management in the 2001–2003 period to the present 107 days average for 2003–04. The average Los Angeles office time to filing in excess of five months is an indicator of the continuing staffing shortages plaguing that office. Overall, current filing time statistics indicate that a substantial and growing number of cases are taking several months or more to reach the filing stage.

Ex. IX-B. Attorney General's Office Case Cycle Times: Processing Time to Filing of Pleading (FY 2003–04)

HQE Office	Total number of pleadings filed	Total number of days pending in AG's office before pleading filed	Average age when pleading filed
Fresno	7	740	105.574 (3.52 months)
Los Angeles	89	14,012	157.438 (5.24 months)
Oakland	11	2,324	211.272 (7.04 months)
Sacramento	40	4,557	113.925 (3.80 months)
San Diego	77	5,974	77.584 (2.59 months)
San Francisco	67	3,387	50.552 (1.69 months)
TOTALS	**291**	**30,994**	**106.51 (3.55 months)**

Source: Medical Board of California

Ex. IX-C. Attorney General's Office Case Cycle Times: Age of Pending Cases with No Pleading Filed (6/30/2004)

HQE Office	Total number of unfiled cases	Total number of days pending as of 6/30/04	Average days per unfiled case
Fresno	4	122	30.5 (1.02 months)
Los Angeles	51	6,002	117.686 (3.92 months)
Oakland	3	55	18.333 (0.61 months)
Sacramento	12	1,278	106.5 (3.55 months)
San Diego	28	5,134	183.357 (6.11 months)
San Francisco	23	3,739	162.565 (5.42 months)
TOTALS	**121**	**16,330**	**134.96 (4.5 months)**

Source: Medical Board of California

Exhibit IX-D below summarizes recent trends in HQE Penal Code section 23 appearances and orders issued. HQE staff have achieved excellent ratios of success in obtaining these important summary forms of licensure sanction, but there are comparatively very few such appearances and such orders for a state with 117,000 practicing physicians.

Ex. IX-D. HQE Penal Code § 23 Appearances

Activity	FY 1999–00	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04
Total PC 23 Appearances	9	10	10	9	16
Total PC 23 Orders Issued	11	11	12	8	15

Source: Medical Board of California

B. Initial Concerns of the MBC Enforcement Monitor

1. HQE cycle times remain lengthy, including recent increases in the filing phase.

Despite the presence of a cadre of experienced DAGs, many of whom are highly skilled and motivated, HQE remains burdened with lengthy case processing times. In particular, HQE is experiencing rapid erosion of earlier progress in the filing phase — the one aspect over which the Attorney General has primary (although not exclusive) control. (See Exhibits IX-B and IX-C above.) Overall, the current average elapsed time for a completed MBC enforcement matter hovers at 2.63 years (a troubling processing time which has been the subject of continuing critiques[210]), but many aspects of this overall process are not within the Attorney General's direct control.

However, HQE's timeframe for the filing of pleadings is a component of this overall delay, and the recent trend is discouraging. As noted above and as discussed in Chapter XIII below, the filing of the accusation turns a confidential investigation into a matter of public record which is posted on MBC's Web site, and a delay in accusation filing means a delay in notice to the public about a potentially dangerous physician. Unsatisfactory average filing times in excess of one year was one of the reasons for the process changes, including the creation of the Health Quality Enforcement Section in SB 2375 (Presley) and its progeny.[211] Implementation of HQE, the DIDO program, and other changes led to a laudable reduction in average case filing times to the 60–70 day level — and below in some HQE offices. However, the most recent MBC statistics now show an average 107-day filing time (using the Board's methodology), with the understaffed Los Angeles office averaging more than five months to the filing of pleadings.

HQE management reports that its recordkeeping system uses different definitions of key events in order to screen out delays not attributable to HQE, and — as a result — HQE statistics indicate shorter filing timeframes. HQE notes that MBC filing time statistics include time (up to 5–10 days) attributable to MBC Executive Director consideration of accusations submitted by HQE for filing. In addition, there appears to be bona fide disagreements as to the dates when certain cases are accepted for pleading by the DIDOs. Under its definitions of these events, HQE reports timeframes of 48.70 to 62.62 days for its average time to file pleadings in 2003-04.[212] However, HQE management readily agrees that overall time to filing has doubled in the past three years — a troubling increase it attributes largely to reduced staff. (The Monitor notes that this kind of recordkeeping dispute as to when matters were handed back and forth is yet another telling illustration of the problems of a "hand-off" prosecution system.)

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[210] *See supra* Ex. V-D.

[211] *See supra* Ch. IV.C. and IV.D. for critiques of delays in MBC case prosecutions.

[212] Source: HQE management memo (Oct. 26, 2004).

In the final analysis, few dispute that the Attorney General's Office faces a challenge in bringing this component of overall MBC case processing back into line with the expectations of the Legislature and the public.

2. HQE attorney staffing is insufficient to meet its statutory and operational requirements.

HQE's six offices have suffered a 15% loss of staff positions in the past three years, with the greatest impact felt in the Los Angeles office. Senior managers presently contend that HQE does not have "a sufficient number of experienced and able [DAGs]" to meet the statutory mandate of Government Code section 12529, especially in the Los Angeles HQE office, as a function of the loss of six DAG positions since early 2002. In the important Los Angeles office, HQE is currently unable to comply with section 12529.5 by staffing the Valencia office with a DIDO DAG, and HQE anticipates that an expected retirement will mean HQE will not be able to staff the Diamond Bar office with a DIDO DAG as of January 2005.

The overall HQE staffing picture is similar: inadequate DAG staff to move all MBC cases rapidly to conclusion. Reduced staffing in key locations (most critically in the Los Angeles office) has resulted in unacceptable delays in case pleading and litigation, and insufficient opportunities for remaining DAG and SDAG staff to engage in training and mentoring of newer attorneys.[213]

In addition, HQE has not been sufficiently staffed to be able to supply CCU with DAGs to review incoming cases and proposed closures as specifically required by law in Government Code section 12529.5(b). The implementation of section 12529.5(b) was not begun formally in CCU until October 2003, some 12 years after the statute became effective. The recent assignment of the first-ever deputy attorney general to this task is a start but only a start. As described in Chapter VI, the role of the current lone DAG assisting CCU is expanding and his contributions are valuable. Today, the CCU DAG now reviews all QC cases in which a simple departure is found, and other QC cases in which there is a split of opinion between the medical consultant and the supervising medical consultant. However, this still falls well short of "working closely with each major intake . . . unit . . . to assist in the evaluation and screening of complaints . . . ." For example, the CCU DAG is not yet reviewing PC cases (or there is confusion about that), is only reviewing a very small percentage of cases going forward, and has to date played only a modest role in medical records procurement. This position has not been fully integrated into the many other CCU activities where legal input would be beneficial.

[213] Many of these recent staffing constraints may be attributable to the threat of potential lay-offs faced by the Attorney General's Office for most of 2004, a threat which may now be easing.

3. Attorney/investigator coordination and teamwork is inadequate.

Notwithstanding good faith efforts, the current system linking HQE prosecutors with MBC investigators is characterized by inadequate coordination and teamwork. HQE prosecutors generally receive "hand-off" cases which have been investigated and assembled with little or no input whatsoever from the HQE trial prosecutor who will handle the case. Although the DIDO program has provided a varying measure of additional HQE legal input into the investigative process, most HQE prosecutors still complain that they do not play a role in shaping the cases they receive or the investigative plans and strategies behind them, leading to frequent problems of late changes in case focus, amended pleadings, and lengthy delays while cases are re-evaluated and re-investigated. Complex medical cases continue to evolve as the litigation develops, and HQE DAGs today do not have significant investigator assistance with crucial follow-up needed as these changes take place. And few if any HQE prosecutors enjoy the enormous benefit of continuous assistance from a peace officer investigator who is present during the pre-hearing and hearing process.

The principal discussion of the present HQE and MBC case coordination relationship is found above in Chapter VII.B.2., and the analysis of that section is incorporated here.

The DIDO compromise and the vertical prosecution alternative. Reflecting from the perspective of the trial attorneys in HQE assigned to handle these matters, it is clear that the Legislature's compromise on the preferred vertical prosecution model proposed in 1990, which is codified in Government Code section 12529, offers at least some of the benefits of vertical prosecution, but has not produced the true teamwork system required for optimal efficiency and effectiveness.

The DIDO program's formal implementation, some six years after section 12529 *et seq.* became effective, has helped to reduce the timeframe for the drafting and filing of accusations from over a year in 1991 to 107 days now[214] (although this shorter timeframe is not due solely to the implementation of DIDO) — and even this level of progress is very important because the filing of the accusation makes the matter public and can protect consumers. The DIDO program has placed attorneys onsite at district offices regularly where they are at least theoretically able to provide legal guidance during the investigative process. The DIDO program is certainly better than the prior "hand-off" situation in which investigators lacking any legal guidance whatsoever were investigating cases and handing them off to a prosecutor who lacked any investigative assistance and who had no role in guiding the investigation prior to the "hand-off."

However, DAGs and managers in HQE were nearly unanimous in their conclusion that DIDO has many flaws and has not yielded the benefits a true vertical prosecution system would provide.

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[214] *See supra* Ex. IX-B (106.51 days to filing of pleading on average).

The present DIDO program is widely perceived as inefficient and even a wasteful use of the DIDO DAG's time, coming as it does at the cost of depriving HQE of a line prosecutor without creating a true case team. Exacerbating this resource concern, our interviewees often noted the redundancy and inefficiency of having three valuable DAGs sequentially review and learn a case in order to move it through the current process: (1) the DIDO for acceptance (and pleading in some offices); (2) an SDAG for evaluation and assignment; and (3) the trial DAG for pleading and prosecution.

HQE personnel correctly perceive that DIDO is not implemented uniformly throughout the state. And this only worsens the existing measure of confusion among HQE attorneys and MBC investigators and supervisors as to the chain of command and the roles of the participants. Many DIDO DAGs manage to work out this confusion on a one-on-one basis, but many in the system complain of lack of clarity and an excess of chefs in the kitchen.

HQE attorneys note all the disadvantages detailed above in Chapter VII regarding the present "hand-off" system (even with the DIDO modification): The present system does not enable the trial attorney to invest in a case from the first day, or guide its investigation. The current system does not enable the trial attorney to assist in medical records procurement; does not enable the trial attorney to participate in the selection of an expert or the determination of what materials should be forwarded to the expert; and does not permit the accusation to be drafted by the DAG who will try the case, at least in many offices including those in southern California where approximately 60% of MBC's cases originate. And most frustrating of all to many trial DAGs, the present system results in little or no follow-up support from the case investigators, resulting in frequent and time-consuming requests for additional investigation after case has been transmitted to HQE, and completely depriving these trial lawyers of the skilled and knowledgeable "IO" (investigating officer) who assists at the hearing in most every other form of complex prosecution. In this latter connection, several HQE staff members lamented the demise of the recent experiment in which an MBC investigator was placed full-time in the Los Angeles HQE office to assist trial DAGs with follow-up investigation immediately before hearings. That experiment worked very well by these reports, and demonstrates the type of positive experience and teamwork that vertical prosecution could bring.

The overwhelming consensus among HQE attorneys and supervisors favors the full implementation of the vertical prosecution model in which an attorney/investigator team is formed at the inception of an investigation and works together to the case's conclusion. This system is described in detail in Chapter VII.B. above.

4. Attorney assistance is not used sufficiently in MBC's medical records procurement process.

A detailed discussion of this issue is found above in Chapter VII.B.3, and is incorporated here. In overview, HQE prosecutors are seldom used for subpoena enforcement actions and most

DAGs make little or no use of section 2225.5 sanctions for failure to produce medical records, notwithstanding strong statutory authority and supporting case law.[215] According to HQE management, only 22 subpoena enforcement actions were brought by HQE on MBC's behalf in fiscal year 2001–02, and 17 such actions were brought in 2002–03. Similarly, HQE brought three actions for sanctions for delay in records production pursuant to section 2225.5 in 2001–02, and about ten such actions in 2002–03 — only two of which successfully obtained monetary sanctions.[216] No other section 2225.5 sanction motions have been granted in recent years. Largely as a result of the infrequent use of these enforcement tools, doctors and their lawyers pay little attention to section 2225.5 sanctions because they are generally aware of the infrequent enforcement of these sanctions, and further because even at $1,000 per day, the potential sanctions exposure is comparatively modest in light of most doctors' incomes.

Serious delays in medical records procurement are pervasive in the 1800-plus investigations handled each year, making it difficult to understand how 19 subpoena enforcement actions and a half dozen sanction actions (most without sanction orders) are sufficient to address this problem each year.

An additional component of this issue from the prosecutor's perspective is the concern over obtaining certified medical records for use in anticipated administrative hearings in MBC matters. Many DAGs we interviewed indicated that administrative law judges often demand such certified records, notwithstanding the fact that there is no requirement in the law for certification of these medical records as a prerequisite for their admissibility. MBC investigators occasionally balk at insisting on certification during the field investigative process, and HQE attorneys cite this as an example of the disconnect between the two staffs. To complicate the matter, MBC investigators and HQE attorneys report that certain defense counsel routinely refuse to allow their clients to produce certified records, and then refuse to stipulate to their admission at hearing because the records are not certified. Such gamesmanship has no place in an ordered legal process, and clarification of this issue may be necessary to eliminate yet another HQE burden and source of delay.

5. HQE and MBC make inadequate use of their ISO/TRO powers and the Penal Code section 23 authority.

MBC periodically identifies subject physicians who may be an imminent danger to the public if they continue to practice. These circumstances call for the immediate application of the statutory

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[215] *See generally* Gov't Code § 11180 *et seq*.; Bus. & Prof. Code § 2225.5; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4.

[216] Source: HQE management memo (May 3, 2004). Only one enforcement proceeding (against a podiatrist in northern California) is familiar to most investigators; HQE management is aware of two such cases.

authority in California for interim remedies to protect the public. MBC and HQE are empowered to seek such emergency preliminary relief in two forms: (1) an interim suspension order (ISO) under Government Code section 11529, where MBC and HQE may obtain a court order under which a physician's right to practice may be partially or entirely suspended during the pendency of disciplinary proceedings; and (2) a temporary restraining order (TRO) under Business and Professions Code section 125.7, through which HQE representing MBC may obtain a court's temporary order restraining further wrongdoing or medical practice pending adjudication of the matter at issue. These powerful emergency remedies have obvious and special importance in the context of physicians on whose competence and sound decisionmaking depend the lives of patients in California.

A somewhat related enforcement authority is found in Penal Code section 23, which permits HQE to appear in any criminal proceeding against an MBC licensee "to furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public." In practice, HQE attorneys representing the Medical Board appear in criminal matters involving physicians to recommend orders barring the physicians from practice, or other terms, as conditions of probation or other components of the defendants' sentences.[217]

The enforcement output statistics in Exhibits IX-A and IX-D above indicate a troubling decline in the efforts to use the powerful ISO/TRO authority in MBC cases in the recent past. ISOs/TROs sought by HQE on behalf of the Medical Board diminished from a high of 40 in 2001–2002 to 26 in the 2003–04 fiscal year (a decline of 40%). Given the importance of these public safety circumstances, a decline in the use of this tool is a source of concern to the Monitor.

Of similar concern is the comparatively infrequent use by HQE and MBC of the resource-efficient appearances in superior court criminal proceedings under Penal Code section 23. The agencies' track record of success is excellent, with 15 orders obtained in 16 appearances, but the overall number of appearances statewide (16) suggests that many other appropriate uses of this authority pass unrecognized. In part this is attributable to prosecutors' and judges' unfamiliarity with this process. However, MBC and HQE should be taking the lead in efforts to improve the system of inter-agency communications and to promote better utilization of this important mechanism.

6. Needed improvements in HQE case tracking and management information systems have begun and must be properly implemented.

As described above, HQE and the Attorney General's Office as a whole have long been subject to criticism for the outdated and antiquated management information system which they have

[217] *See* Penal Code § 23.

operated in recent years. To address these concerns, the Attorney General has installed the long-awaited ProLaw management information system. Implementation of ProLaw is still in its gestational stage, and at this early point even the staff of the Attorney General's Office is unclear as to what kind of management reports it can produce and/or what kind of information they must input in order to generate those reports.

This new system holds substantial promise for improved case tracking, accurate client billing, and management analysis, but this promise has not been fully realized yet. The Monitor will continue to evaluate this new system during the balance of the Monitor's term. At the very least, there is a clear consensus that this long-overdue update to the AG's management information system is necessary and must be fully implemented.

7. HQE has no formal policy and procedure manual to ensure uniformity and assist in training.

HQE presently has no formal policy and procedure or operations manual in place regarding its functions and process. Our interviewees indicate that, while memoranda and other written materials are distributed periodically (and there is a short 20-page "handbook" for DIDO DAGs[218]), HQE has not yet organized its policies and procedures into a single comprehensive written manual. This leads to diverging policies and inconsistencies among HQE offices. For example, different SDAGs in HQE report differing policies on periodic case reviews — a common feature of most law office management systems — with some supervisors employing monthly or quarterly formal review sessions with each trial DAG, and other supervisors simply handling case review informally on an "as needed" basis.

Related to the concern about an HQE operations manual, most training in HQE for new DAGs appears to be infrequent and informal, with the majority of the guidance provided by SDAGs and more experienced HQE staff on an *ad hoc* and verbal basis as questions arise. This observation is consistent with a more general observation by this project and others concerning the need for improved and standardized training at the Attorney General's Office generally.[219] This informal word-of-mouth system of training will likely prove increasingly unworkable because many of today's HQE prosecutors are in their fifties and likely to retire in the relatively near term. Loss of institutional memory and practical trial experience could be compensated for, to at least some extent, by a properly drafted policy and procedure manual which preserves the benefits of that experience.

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[218] Health Quality Enforcement Section, *Deputy in District Office Handbook* (undated).

[219] *See, e.g.*, PriceWaterhouseCoopers, *Organizational Assessment – State of California, Office of the Attorney General – Legal Divisions* (2001) at III-20.

8. The current venue statute for adjudicative hearings results in substantial and unnecessary costs for HQE, OAH, MBC, and — ultimately — disciplined physicians and the physician population generally.

Government Code section 11508 governs the venue for adjudicative hearings under the Administrative Procedure Act — including MBC hearings at which the HQE DAG, the respondent and his/her counsel, and the OAH ALJ must appear. Subsection (a) of that statute generally designates hearing location based on the appellate district in which the transaction occurred or the respondent resides. It does not limit hearing location to cities in which HQE and OAH have offices. For example, if the transaction occurred or the respondent resides in the Fourth Appellate District (San Diego and Imperial counties), the hearing must be held in "San Diego County." If the transaction occurred or the respondent resides within the Second or Fourth Appellate Districts other than San Diego and Imperial Counties, the hearings must be held in "Los Angeles County." Subsections (b) and (c) then make exceptions to subsection (a), and permit the agency to select a different venue under certain circumstances, and the respondent to seek a change in the venue selected by the agency.

Under this statute, hearings may be held anywhere in the state — frequently causing HQE, OAH, and/or respondent's counsel to incur significant costs. If the respondent resides in San Bernardino (in which neither HQE or OAH has an office), the respondent may insist that the hearing be held in San Bernardino — requiring HQE to find and pay for a hearing room. Additionally, the HQE DAG, the OAH ALJ, and often respondent's counsel will be required to drive long distances to San Bernardino for the hearing. If the hearing lasts more than one day, hotel costs will be incurred by all involved. All parties often pay additional costs because of this statute. Some of these costs may even find their way into cost recovery ordered against a disciplined respondent under section 125.3. However, these costs fall disproportionately on HQE — and ultimately MBC — because HQE handles all physician discipline cases.

The recent hiring freeze and budget cuts have exacerbated the problems posed by this statute. As noted above, HQE's Los Angeles office has been devastated by the loss of six attorney positions, and two other attorneys are out on extended medical leave. This shortage has resulted in HQE's decision to require San Diego DAGs to handle many cases arising out of Orange County. This requirement has resulted in additional costs to HQE, OAH, and MBC, and significant unproductive travel time and inconvenience for the deputies and judges involved. And when hearings in those matters are held in Orange County for the "convenience" of the respondent, the respondent will bear the additional costs incurred by his/her counsel (who is usually from Los Angeles).

Section 11508 was originally enacted in 1945 and has only been amended when additional appellate districts have been created. It does not conform to today's extraordinary state budget

dilemma or to the physical location of HQE and OAH offices. Requiring adjudicative hearings to be held in cities in which HQE and OAH already have office facilities will substantially lessen costs for MBC, and in many cases for the respondent as well.

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #33: MBC and HQE should fully implement the vertical prosecution model. As described above in Chapter VII.C. and Recommendation #22, full implementation of the vertical prosecution model — in which an attorney/investigator team is formed at the inception of an investigation and works together to the case's conclusion — would greatly improve the efficiency and effectiveness of HQE's prosecution efforts and MBC's enforcement process as a whole. The Monitor believes the vertical prosecution system could best be implemented by merging existing MBC investigators and supervisors into HQE. However, this system could also be effectuated through coordinated assignments to case teams by the respective agencies.

Recommendation #34: MBC and HQE must revise their medical records procurement and enforcement policy to ensure prompt and full compliance with existing laws, and the role of HQE attorneys in medical records procurement issues should be expanded. HQE and MBC should adopt and strictly enforce a comprehensive medical records procurement policy which is consistently applied in all MBC enforcement cases, as more fully described above in Chapter VII.B.3. and Recommendations #7 and #23. HQE might consider the formation of a small "strike team" of prosecutors familiar with and skilled in subpoena preparation and enforcement actions.

Recommendation #35: The Attorney General's Office should come into full compliance with Government Code section 12529 *et seq.* by adequately staffing HQE to restore lost attorney positions and to fulfill all missions required by these statutes. The Attorney General's Office should take all necessary steps to comply with the staffing mandates of section 12529 *et seq*. by restoring HQE's prosecutor positions lost in recent years (at least six DAG positions) and by assigning sufficient additional DAG staff to fulfill the CCU assistance function and improve on HQE's current track record of moving MBC cases forward rapidly to conclusion. As appropriate, the Attorney General's Office should consider transfers of DAGs from non-fee-generating units to HQE to satisfy pressing HQE personnel needs in Los Angeles, CCU, and elsewhere.

Recommendation #36: MBC and HQE should improve their cooperation with state and local prosecutors, including increased use of Penal Code section 23. As addressed in Recommendation #25 in Chapter VII.C., HQE personnel should join with MBC staff in strengthening existing communications and working relationships with state and local prosecutors to ensure increased coordination of efforts, and in particular to promote increased use of the resource-efficient and highly effective Penal Code section 23 mechanism which is underutilized today.

Recommendation #37: MBC and HQE should make better and more extensive use of the powerful interim suspension order and temporary restraining order tools. Additional resources and training should be directed to reverse the downward trend and to promote increased HQE use of the powerful ISO and TRO interim remedies. Consideration should be given to establishing a rapid response team within HQE to handle these pressing public safety matters on an expedited basis statewide.

Recommendation #38: HQE should develop a formal policy and procedure manual to improve consistency and assist in prosecutor training. HQE must develop and use a policy and procedure manual which adequately covers all the key operations and functions in HQE. The manual should be updated periodically by appropriate management staff and experienced trial personnel. This manual would free HQE from reliance on oral history and verbal training from veteran staff, and would facilitate continuing on-the-job training of new HQE prosecutors.

Recommendation #39: Government Code section 11508 should be amended to locate venue for HQE administrative hearings in the cities of Sacramento, Oakland, Los Angeles, and San Diego. This recommendation would enable the Attorney General to require that adjudicative hearings be held at the hearing facilities maintained by OAH in Sacramento, Oakland, Los Angeles, or San Diego. HQE has offices in all of these cities. In addition, most defense counsel who regularly represent physicians in MBC disciplinary matters are based in one of these cities. The convenience to the respondent afforded by this statute is surely outweighed by the extraordinary costs it imposes on the system — and ultimately MBC and California physicians who pay MBC's licensing fees. The statute currently permits the parties to agree to other hearing locations in unusual circumstances (for example, if the respondent physician is in poor health and unable to travel), and that provision should remain to ameliorate any special respondent hardships. However, the statutory presumption should be that these hearings are to take place in large-city locations in which HQE and OAH already have offices.